UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

OSF HEALTHCARE SYSTEM d/b/a ST. FRANCIS HOSPITAL

and Case 30-CA-105167

MICHIGAN NURSES ASSOCIATION

Renee M. Medved, Esq., for the General Counsel. Mark Nelson, Esq., of Chicago, Illinois, for the Respondent. Richard York, Esq., of Okemos, Michigan, for the Charging Party.

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was scheduled for hearing on March 11, 2014. The charge was filed by the Michigan Nurses Association (Charging Party or Union) on May 15, 2013, against OSF Healthcare System d/b/a St. Francis Hospital (Respondent or Employer). The complaint, issued on December 18, 2013, alleges Respondent violated Section 8(a)(5) and (1) of the Act by on about May 1, 2013, after the expiration of the collective-bargaining agreement theretofore in effect ceasing dues checkoff for bargaining unit employees. On February 27, 2014, the parties submitted a joint motion to transfer proceedings to the division of judges and a stipulation of facts with attachments. The joint motion waived a hearing and sought findings of fact, conclusions of law, and a recommended order by the administrative law judge. On March 4, 2014, I issued an Order granting the motion to transfer the proceedings, approving the stipulation of facts, and cancelling the hearing. I also set a date for the filing of briefs.

On the entire record, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following:

Findings of Fact

I. JURISDICTION

Respondent, a corporation with an office and place of business in Escanaba, Michigan (Respondent's facility) has been engaged in the operation of a private nonprofit acute care hospital providing medical care. During the past calendar year, Respondent, in conducting its described operations derived gross revenues in excess of \$250,000, and purchased and received goods and materials valued in excess of \$5,000 directly from points located outside the

State of Michigan. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The parties' stipulation of facts reads, in part, as follows:

- 9. The following employees of Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act (the Unit): All full-time and regular part-time registered nurses, including charge nurses and per diem registered nurses; excluding all other employees, including but not limited to physicians, all other professionals, technical employees, maintenance employees, business office employees, clerical employees, other staff employees, members of religious orders, managers and supervisors as defined in the National Labor Relations Act.
- 10. Since 2003, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements.
- 11. At all times since 2003, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.
- 12. Charging Party and Respondent had a collective-bargaining agreement with effective dates of May 1, 2009 to April 30, 2013.
- 13. The collective-bargaining agreement referenced in paragraph 12, and attached as Exhibit 4, contained the following provision at Section 7.1 concerning dues-checkoff: The Employer agrees to make deductions from the pay of employees covered by this Agreement, pursuant to the Union's deduction authorization form signed by the employee. The authorization for the payroll deductions shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner.
- 14. A sample of the dues authorization form that was used by the parties during the material times is attached as Exhibit 5.¹
- 15. On May 1, 2013, upon expiration the collective-bargaining agreement attached as Exhibit 4, Respondent announced via email to bargaining unit employees that it was ceasing dues-checkoff. A copy of this email is attached as Exhibit 6.
- 16. On May 1, 2013, upon expiration of the collective-bargaining agreement attached as Exhibit 4, Respondent ceased dues-checkoff.
- 17. Respondent engaged in the conduct as described above in paragraph 16, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.
- 18. Respondent resumed dues-checkoff as of February 1, 2014 upon reaching a successor agreement with Charging Party.
- 19. Charging Party and Respondent negotiated their first collective- bargaining agreement in 2003. During those negotiations, Charging Party made its initial proposal for dues-checkoff. Charging Party included in its proposal language concerning authorization for dues deduction based on the language of Section 304(c)(4) of the Taft-Hartley Act. During those same negotiations, the Employer proposed the addition of

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¹ The dues authorization form gave employees the option of paying their dues by: payroll deduction by Respondent; electronic funds transfer directly from the employees bank account to the Union; the Union directly charging the employees credit card; or by personal check made out by the employee to the Union.

"whichever is sooner" for fuller consistency with Section 302(c)(4), which was agreed to by Charging Party and incorporated into the final language.

20. After the initial contract, which was effective 2003-2006, Respondent and Charging Party entered into two subsequent successor collective-bargaining agreements (2006-2009 agreement and the most recently expired agreement which is attached as Exhibit 4). The language concerning dues-checkoff in both successor agreements, including the most recently expired agreement, is the same language as contained in the 2003 agreement.

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- 21. There was a contract hiatus period at some point between May 2009 and December 2009, during which no collective-bargaining agreement was in effect. Though the parties had agreed to extend the collective-bargaining agreement beyond its April 30, 2009 expiration, that extension ended prior to a successor agreement being reached. Besides that period in 2009 and the most recent hiatus period beginning on May 1, 2013, there were no other prior periods during which there was no collective-bargaining agreement in effect.
- 22. Historically, bargaining unit employees have had to fill out an initial dues-checkoff authorization form (a sample of which is attached as Exhibit 5). Since 2003 and at all material times, the Employer has not required employees to complete new authorization forms on a yearly basis or after expiration of a contract in order to continue dues-checkoff.
- 23. Prior to May 1, 2013, Respondent had never ceased its practice of checking off dues pursuant to individual authorizations.
- 24. On March 28, 2013, Michigan Public Act. No. 348 of 2012 (also known as the Michigan Freedom to Work Act) became effective. Its provisions apply to non-public collective-bargaining agreements in Michigan, including the collective-bargaining agreement between Respondent and Charging Party. Public Act No. 348 of 2012, inter alia, provides that covered employers cannot require employees "as a condition of obtaining or continuing employment to...pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization." A copy of Public Act No. 348 is attached as Exhibit 7. The parties agree that the Administrative Law Judge may take administrative notice of Michigan Public Act. No. 348.
- 25. This Stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.

STATEMENT OF ISSUE PRESENTED

Based on the foregoing factual stipulations, the parties agree that the legal issue to be resolved in this matter is whether the Respondent violated Section 8(a)(1) and (5) by unilaterally ceasing dues-checkoff upon the expiration of the parties' collective-bargaining agreement on May 1, 2013.

A. Analysis

In Local Joint Executive Bd. of Las Vegas v. NLRB, 657 F.3d 865, 875-876 (9th Cir. 2011), the court stated:

Where the dues-checkoff provisions do not implement union security, however, but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force. We see nothing in the NLRA that limits the duration of dues-checkoff to the duration of a CBA in the absence of union security. Moreover, other statutory provisions suggest the opposite. For instance, the Labor–Management Relations Act provides that "a written assignment [for dues-checkoff] shall not be irrevocable ... beyond the termination date of the applicable

collective agreement." 29 U.S.C. § 186(c)(4). This provision would be surplusage if Congress believed that dues-checkoff automatically terminated upon the expiration of a CBA. See Nw. Forest Res. v. Glickman, 82 F.3d 825, 834 (9th Cir.1996) ("We have long followed the principle that '[s]tatutes should not be construed to make surplusage of any provision.") (citation omitted).

Accordingly, we conclude that in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining. Because each affected employee individually requested dues-checkoff, the Employers' actions in this case were an unlawful termination of a bargained benefit to employees, not merely the cessation of a provision that automatically terminated along with the CBA and union security. The Employers' unilateral termination of dues-checkoff in this case was thus "in effect a refusal to negotiate ... which reflect[ed] a cast of mind against reaching agreement." *Katz*, 369 U.S. at 747, 82 S.Ct. 1107. In ceasing dues-checkoff without bargaining to impasse, the Employers therefore violated section 8(a)(5) of the NLRA.

In *Local Joint Executive Bd. of Las Vegas v. NLRB*, supra, the court noted that Nevada was a right to work state, and that, although the union could not require that all workers become dues-paying members of the union, the union was guaranteed timely, accurate payment of dues by the workers who chose to join the union and authorize a checkoff. The dues checkoff provision also benefitted participating employees, who did not incur the cost and effort of submitting dues to the union themselves. There, the contractual dues checkoff provision read:

The Check-Off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made part of this Agreement, shall be continued in effect for the term of the Agreement. Id. at 868.

In *WKYC-TV, Inc.*, 359 NLRB No. 30, slip op. at 1 (2012), the Board majority, citing *Local Joint Executive Bd. of Las Vegas v. NLRB*, supra, stated:

We accordingly hold that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.

In *WKYC*, the parties had been parties to multiple collective-bargaining agreements, the most recent of which contained a union-security agreement, which required employees to become and remain members of the union as a condition of employment. The contract also contained a provision under which the respondent, pursuant to signed employee authorizations, agreed to deduct union dues from employees' wages and remit them to the union, which the Board noted was commonly referred to as dues checkoff. The Board stated the contract also included a form whereby employees could authorize dues checkoff. There, following the termination of the contract, the respondent continued to honor the dues checkoff provision and continued to deduct and remit dues to the union. It later implemented portions of its final offer, but informed the union that union security and dues check off were not among the provisions of the final offer that it intended to implement. At a subsequent date, the respondent ceased deducting and remitting dues to the union. The Board majority stated:

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when, following contract expiration, it ceased honoring the dues-checkoff arrangement without first providing the Union notice and an opportunity to bargain over that decision. Applying *Bethlehem Steel*, the judge found that the Respondent was free to unilaterally

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cease honoring the dues-checkoff arrangement when the contract expired. In their exceptions, the Acting General Counsel and the Union urge the Board to abandon the *Bethlehem Steel* rule and find that an employer's obligation to check off union dues survives contract expiration. The Respondent urges the Board to continue to adhere to *Bethlehem Steel* and its progeny.

We agree with the Acting General Counsel and the Union. We find that requiring employers to honor dues-checkoff arrangements postcontract expiration is consistent with the language of the Act, its relevant legislative history, and the general rule against unilateral changes in terms and conditions of employment. In holding to the contrary, the Board in *Bethlehem Steel* failed to take these considerations into account, and engaged instead in reasoning that cannot withstand scrutiny, even on its own terms. We therefore find that *Bethlehem Steel* and its progeny must be overruled. *WKYC*, supra, slip op. at 2.

Citing *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962), the *WKYC* Board majority stated:

Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement, as in this case. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In the latter circumstances, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. Id. at 198-199.

An employer's decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired collective-bargaining agreement plainly contravenes these salutary principles. Under settled Board law, widely accepted by reviewing courts, [FN7] dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of the Act and is therefore a mandatory subject of bargaining. See, e.g., *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009). The status-quo rule, then, should apply to dues checkoff, unless there is some cogent reason for an exception. We see no such reason. *WKYC*, supra, slip op. at 2 and 3.

Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff arrangement does not involve the contractual surrender of any statutory or nonstatutory right. [FN10] Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction. [FN11] Payments via a dues-checkoff arrangement are thus no different from other voluntary checkoff agreements, such as employee savings accounts and charitable contributions, which the Board has recognized also create "administrative convenience" and-- notably-survive the contracts that establish them. *Quality House of Graphics*, 336 NLRB 497, 497 fn. 3 (2001). [FN12] *WKYC*, supra, slip op. at 2, 3-4.

It was stated in WKYC that:

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...Section 302 of the Taft-Hartley Act, which, at the very least, creates no obstacle to finding that an employer violates the Act by unilaterally discontinuing dues checkoff after contract expiration. [FN13] Section 302(a) of the Act generally prohibits employer payments to unions, but Section 302(c) exempts certain payments from that prohibition, including

dues checkoff. Section 302(c)(4), the exception for dues checkoff, states in pertinent part:

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The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner[.] [Emphasis added.]^[FN14]

The plain terms of this provision indicate that Congress contemplated that a duescheckoff arrangement would continue beyond the life of the collective-bargaining agreement establishing it. First, Section 302(c)(4) contains no language making duescheckoff arrangements dependent on the existence of a collective-bargaining agreement. Rather, the only document necessary for a legitimate dues-checkoff arrangement, under the unambiguous language of Section 302(c)(4), is a "written assignment" from the employee authorizing deductions. [FN15] Second, had Congress intended that dues-checkoff arrangements would automatically expire upon contract expiration, there would have been no need to say that employees can revoke their checkoff authorizations at contract expiration. Simply put, if dues checkoff expired with the contract, there would be nothing left thereafter for an employee to revoke. [FN16] And. of course, it is abundantly clear that, whether during or after the term of a contract, the proviso to Section 302(c)(4) is concerned only with an individual employee's right to withdraw his checkoff authorization; nothing therein even remotely suggests that Congress intended to permit employers to unilaterally revoke checkoff arrangements. Id. slip op. at 4.

In *WKYC*, the Board distinguished union security clauses, which require union membership during the life of a collective bargaining agreement, and contractual check off provisions. The Board held the former do not survive the expiration of the collective-bargaining agreement, while voluntary dues check off does. The Board majority stated:

The independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in "right-to-work" States. [FN21] In those jurisdictions, parties are prohibited from including a union-security agreement in a contract, yet parties' contracts in those states may nonetheless include dues-checkoff arrangements. Notably, that was the circumstance in *Tampa Sheet Metal*, 288 NLRB 322 (1988). There, the Board held, without explanation, that a dues-checkoff arrangement did not survive contract expiration, even though union security was prohibited under a State "right-to-work" law. Id. at 326 fn. 15. The facts of *Tampa Sheet Metal* demonstrate the falsity of *Bethlehem Steel's* premise that dues-checkoff "implements" a union-security agreement. Its holding, for which the Board has never provided any rationale, exposes the fundamental infirmity of the *Bethlehem Steel* holding. The undeniable reality is that union-security and dues-checkoff arrangements can, and often do, exist independently of one another. The Board's "[s]imilar considerations" reasoning in *Bethlehem Steel* therefore cannot stand. [FN22]

Fourth, *Bethlehem Steel* failed to acknowledge another crucial dissimilarity between dues checkoff and union security: the fundamental difference between their compulsory and voluntary natures. Under a union-security agreement, employees are compelled to pay union dues or agency fees, or face discharge. [FN23] By contrast, an employee's participation in dues checkoff is entirely voluntary; "employees cannot be required to authorize dues checkoff as a condition of employment," even where a contract contains

a union-security agreement. *Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007). ^[FN24] Although an employee who is subject to a union-security agreement may be more likely to choose dues checkoff, participation in dues checkoff still is in no way compelled. An employee has a right under Section 7 to select or reject dues checkoff as the method by which to pay union dues, and may choose to pay dues by another method. ^[FN25] Contrary to *Bethlehem Steel* then, as the Board has since acknowledged, union security and dues checkoff are "distinct and separate matters." *American Nurses' Assn.*, 250 NLRB 1324, 1324 fn. 1 (1980). ^[FN26] As noted above, the unique administrative nature of a duescheckoff arrangement further distinguishes it from a union-security agreement. ^[FN27]

Last, developments in the Board's case law since *Bethlehem Steel* only cast further doubt on its reasoning. For example, if union security and dues checkoff are governed by "similar considerations," presumably it would be as unlawful for an employer, postcontract expiration, to *continue* to honor a dues-checkoff arrangement as it would be to continue to honor a union-security arrangement. Yet the Board has never prohibited an employer from continuing to check off dues after a contract expires. To the contrary, the Board has long held that an employer "does not violate the Act by voluntarily continuing dues checkoff after a collective-bargaining agreement has expired," and that "after a contract has expired and the employer has terminated dues checkoff, the employer may lawfully agree to resume deducting union dues." *Tribune Publishing*, supra, 351 NLRB at 197 fn. 8. [FN28] The incompatibility of the two lines of cases demonstrates that the connection between union security and dues checkoff cannot bear the burden the Board assigned to it in *Bethlehem Steel*. *WKYC*, supra, slip op. at 6-7.

The contractual dues checkoff provision and checkoff authorization form in *WKYC* read as follows:

Art. II of the contract:

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Upon receipt of a signed authorization of the Employee involved . . . the Corporation shall deduct from the Employee's pay the Union initiation fee and the dues payable by him or her to the Union, during the period provided in the authorization. . . . The Corporation will, on each pay period after such authorization has been received, withhold such dues and/or initiation fees from each Employee's paycheck. Deductions shall be limited to such Employees from whom the Corporation has received written authorization to deduct said dues and/or fees.

The dues-checkoff authorization form stated:

[Employees] submit this authorization and assignment with the understanding that it will be effective and irrevocable for a period of one (1) year from this date [the date an employee signs a check-off authorization form], or up to the termination of the current collective bargaining agreement between WKYC-TV and NABET, whichever occurs sooner This authorization and assignment shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above and each subsequent yearly period shall be similarly irrevocable unless revoked by me within ten (10) days prior to the expiration of any irrevocable period hereof. Such revocation shall be affected by written notice. Id. slip op. at 2 fns 5, 6.

In the instant case, the Respondent and the Union have been parties to a collective-bargaining relationship for the bargaining unit at issue since 2003. They negotiated their first collective-bargaining agreement for the unit in 2003. During those negotiations, the Union made a proposal for dues checkoff which included language concerning authorization for dues deduction based on language in Section 304(c)(4) of the Taft-Hartley Act. During those negotiations, the Respondent proposed the addition of "whichever is sooner" for fuller consistency with Section 302(c)(4), which was agreed to by the Union and incorporated into the

final language of the agreement. The parties' first collective-bargaining agreement had effective dates of 2003-2006, and the successor agreement had effective dates of 2006 to 2009. There was a contract hiatus at some point between May 2009 and December 2009, during which no collective-bargaining agreement was in effect. Besides that period in 2009 and the most recent hiatus period beginning on May 1, 2013, there were no other prior periods during which there was no collective-bargaining agreement in effect. The parties' third collective-bargaining agreement had effective dates of May 1, 2009 to April 30, 2013.

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The language concerning dues checkoff in both successor agreements is the same language as contained in the 2003 agreement. That is, the collective-bargaining agreement expiring on April 30, 2013, at section 7.1, provided that the Respondent agreed to make deductions from the pay of bargaining unit employees pursuant to the Union's deduction authorization form signed by the employee. The collective-bargaining agreement stated the payroll deductions "shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner." The Union's dues authorization form gave employees several ways in which to pay their union dues one was by Respondent's payroll deduction of those dues and Respondent's forwarding them to the Union and another was by the employee directly sending a personal check to the Union to pay their dues.

On March 28, 2013, Michigan Public Act. No. 348 of 2012 (also known as the Michigan Freedom to Work Act) became effective. Its provisions applied to the collective-bargaining agreement between Respondent and the Union. The Michigan Freedom to Work Act provides that covered employers cannot require employees "as a condition of obtaining or continuing employment to...pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization."

On May 1, 2013, upon the expiration of the cited collective-bargaining agreement, Respondent announced via email to bargaining unit employees that it was ceasing duescheckoff. In the email Respondent stated:

The collective bargaining agreement between the Hospital and the Michigan Nurses Association (MNA) expired at midnight on April 30, 2013. Under the contract, employees were required to pay dues to the MNA; however, when the contract expired, the authorization form you signed also expired. Thus, no deductions can legally be made for union dues until the Hospital and the MNA agree to a new authorization form.

As you may be aware, there is a new law in Michigan (Michigan Freedom to Work Act) that prohibits employees from being required to become a union member in order to keep their jobs. In addition, the new law prohibits employees from being forced to pay union dues.

The Respondent resumed dues checkoff as of February 1, 2014, upon reaching a successor agreement with Union. Since 2003, the Respondent has not required employees to complete new check off authorization forms on a yearly basis or after expiration of a contract in order to continue dues checkoff. Prior to May 1, 2013, Respondent had never ceased its practice of checking off dues pursuant to individual authorizations.

I find Respondent violated Section 8(a)(5) and (1) of the Act by its May 1, 2013 notification to employees and unilateral cessation on that date of dues check off. The Board has held check-off arrangements involve terms and conditions of employment which, absent impasse, survive the expiration of a collective-bargaining agreement. See, *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012). In *WKYC*, the Board noted that check-off arrangements are voluntary, as opposed to union security provisions, and that check-off arrangements are permitted in right to

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work states. It was stated that employees cannot be required to participate in checkoff as a condition of employment even when the contract contains a union security clause. In this regard, it was noted that unlike union security provisions which expire with the contract, the Board has never prohibited an employer from continuing to check off dues after a contract expires.

In the current case, the contract at issue had a union security and a separate checkoffprovision. During the term of the contract, the state enacted a right to work law. However, I do not find this change in state law to be of controlling consequence concerning the dues checkoffprovision. First, although there was a union security clause in effect during the term of the contract, the signing of dues checkoff was voluntarily as employees were given four distinct options for the payment of dues, one of which was checkoff and another was by personal check to the Union. The contract by its terms provided employee checkoff authorization for the payroll deductions shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner. The contract by its terms was three years in length, so individual employees could have ended checkoff on their own during the course of the contract if they elected to do so. In this regard, the checkoff form they signed contained no duration or other limits for the termination of checkoff. Moreover, Respondent participated in a past practice where it did not require employees to renew their checkoff authorizations on their anniversary, or when collective-bargaining agreements expired in the past. In fact, Respondent kept checkoff in effect during a prior contractual hiatus period, and resumed checkoff again in 2014 when it entered into a successor agreement without requiring employees to sign a new dues check off authorization. There is no contention that any individual or group of employees requested Respondent to rescind their checkoff authorizations when the contract expired in 2013, and I find Respondent's doing so on its own constituted a post-contract unilateral change. absent an impasse, and therefore was violative of the Act.

Respondent argues the Michigan right to work law is not preempted by the National Labor Relations Act. Respondent contends that the newly enacted Michigan law prohibited Respondent from making dues deductions when the collective-bargaining agreement expired. Respondent states the Michigan statute prohibits private employers in the state, including Respondent, from requiring any individual "as a condition of obtaining employment or continuing employment to: 1) become or remain a member of a labor organization; and, 2) pay any dues, fees, assessments or other charges or expenses of any kind or amount or provide anything of value to a labor organization." Respondent contends that since the parties' collective-bargaining agreement expired more than two months after the Michigan law took effect the law's prohibitions must be followed. It is contended that if Respondent violated the Michigan statute by making dues deductions from employees' paychecks without a valid authorization to do so, it would be liable for a civil fine of up to \$500. In addition, it would be liable to any employee who suffered an injury as a result of the unlawful deduction(s) for damages, injunctive relief or both. Also, it is asserted if the Respondent did not prevail in a civil action brought against it for dues deductions that violated the Michigan law, the Respondent would be assessed court costs and would be required to pay the employee(s)' reasonable attorney fees. Respondent contends that its legal authority to deduct dues from employees' paychecks exists only pursuant to Section 7.1 of the collective-bargaining agreement. Under the clear and plain language of this provision such authority terminated when the contract expired. It is contended that Respondent would clearly have violated Michigan law had it continued to make deductions and would have been subject to civil fines, actual damages, costs and attorney's fees for every employee for whom it made deductions after the CBA expired. Respondent argues the General Counsel's position here is that Respondent had an obligation to bargain with the Union over whether it should comply with Michigan law.

I do not find Respondent's arguments persuasive. Since signing up for dues checkoff is a voluntary Act on the part of an employee, the participation in such is not a condition of obtaining or continuing employment. There is no contractual vehicle for the Union to request termination of an employee for their ceasing participation in dues check off. Respondent in essence acknowledges this when it resumed checking off dues of employees when the parties entered into their next collective bargaining agreement. The Board has stated, employers can voluntarily continue dues checkoff when a collective-bargaining agreement expired, thus its continuance is not premised on the collective-bargaining agreement remaining in effect. Nor do I find that the parties' collective-bargaining agreement's language required the cessation of checkoff when the contract ended. There was similar contract language in the checkoff provision in *Local Joint Executive Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 875 -876 (9th Cir. 2011), stating checkoff "shall be continued in effect for the term of the Agreement." Yet, in a right to work state, the court found the unilateral post-contract termination of check off by that employer to be violative of Section 8(a)(5) and (1) of the Act.

Here, the parties' collective-bargaining agreement provides, "The authorization for the payroll deductions shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner." Yet, Respondent had not terminated checkoff, as per this language, in the past when the contract expired, nor when the employees reached their anniversary date of signing the check off form. The bargaining history of the parties and the past practice of the parties suggests the language in the parties' contract was written to provide employees with opportunities to terminate their checkoff arrangement, not for Respondent to terminate it for them.

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In this regard, in addition to *Local Joint Executive Bd. of Las Vegas v. NLRB*, supra., the General Counsel has cited cases where the term and condition of employment survived the expiration of the contract, and could not be unilaterally changed by the respondent employer which contained contract language similar to that at issue here. See, *Finley Hospital*, 359 NLRB No. 9, slip op. at 2 (2012) (Employer violated Section 8(a)(5) by discontinuing pay raises after contract expiration where contract established "raises for the duration of this Agreement."); *Allied Signal Inc.*, 330 NLRB 1216, 1216-1217 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) (contract clause stating that the agreement shall remain in effect until the expiration date, "but not thereafter unless renewed or extended in writing by the parties" did not privilege the employer to unilaterally discontinue severance benefits post-expiration); *KMBS*, *Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be nefit funds to be made "as long as a Producer is so obligated pursuant to said collective bargaining agreements" is insufficient to terminate the respondent employer's post contract obligations to contribute to the funds.").

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CONCLUSIONS OF LAW

- 1. OSF Healthcare System d/b/a St. Francis Hospital (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Michigan Nurses Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Union represents Respondent's employees in the following appropriate bargaining unit:

All full-time and regular part-time registered nurses, including charge nurses and per diem registered nurses; excluding all other employees, including but not limited to physicians, all other professionals, technical employees, maintenance employees, business office employees, clerical employees, other staff employees, members of

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religious orders, managers and supervisors as defined in the National Labor Relations Act.

- 4. Since May 1, 2013, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff for bargaining unit employees.
- 5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent unlawfully discontinued dues check off on May 1, 2013. for a period of time following the expiration of the collective-bargaining agreement ending at that time, I shall recommend that Respondent be required to reimburse the Union for any lost dues, with interest, that it would have otherwise been required to withhold for employees who had signed check-off authorizations and transmit to the Union but for its unlawful change. See, YWCA of Western Massachusetts, 349 NLRB 762, 764 (2007); and Plymouth Court, 341 NLRB 363, 363 (2004). The loss of dues to the Union is a result of Respondent's unfair labor practices and therefore the financial responsibility for making the Union whole rests entirely on Respondent, not the employees. See, West Coast Cintas Corp., 291 NLRB 152, 156 fn.6 (1988); Texaco Inc., 264 NLRB 1132, 1145-46 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984). The reimbursement to the Union shall include interest at the rate prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010). I reject Respondent's argument that it should not have to remit dues to the Union on behalf of employees who did not voluntarily continue to pay dues on their own, because this is not the standard applied by the Board, and because it cannot be established which if any of those employees would have at that time voluntarily terminated their checkoff authorization, absent Respondent's unlawful conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. 2

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that Respondent OSF Healthcare System d/b/a St. Francis Hospital its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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- (a) Unilaterally failing and refusing to deduct and remit union dues to the Michigan Nurses Association (the Union) following the expiration of a collective-bargaining agreement containing a dues checkoff arrangement, such as the May 1, 2009 to April 30, 2013 agreement, for those employees who have or had in effect a signed dues checkoff authorization form.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Immediately start and/or continue deducting and remitting to the Union dues as required by the terms of any successor collective-bargaining agreement for employees who

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

have executed a dues checkoff authorization.

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- (b) Make whole, in the manner set forth in the remedy section of this decision, the Union for any dues Respondent should have, but failed to check off and remit to the Union, at Respondent's expense, with interest, for the losses resulting from Respondent's failure to deduct and remit dues to the Union since May 1, 2013, for employees who had executed a valid dues checkoff authorization form.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of other compensation due under the terms of this Order.
- (d) Within 14 days after service by the Region, post at its facility in Escanaba, Michigan, or any other facilities where bargaining unit employees work copies of the attached notice marked Appendix.³ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current or former bargaining unit employees employed by Respondent at any time since May 1, 2013.
- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

35	Eric M. Fine
	Administrative Law Judge

Dated, Washington, D.C. April 10, 2014.

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with Michigan Nurses Association (the Union) as the exclusive collective bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time registered nurses, including charge nurses and per diem registered nurses; excluding all other employees, including but not limited to physicians, all other professionals, technical employees, maintenance employees, business office employees, clerical employees, other staff employees, members of religious orders, supervisors and managers as defined in the National Labor Relations Act.

WE WILL NOT unilaterally fail and refuse to deduct and remit union dues to the Union following the expiration of a collective-bargaining agreement containing a dues checkoff arrangement, such as the May 1, 2009 to April 30, 2013 agreement, for those employees who have or had in effect a signed dues checkoff authorization form.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately start and/or continue deducting and remitting to the Union dues as required by the terms of any successor collective-bargaining agreement for employees who have executed and have in effect a dues checkoff authorization.

WE WILL, at our expense not that of employees, make the Union whole, with interest, for any dues it should have received since May 1, 2013, but for our failure to check off and remit those dues to the Union for employees who executed a dues checkoff authorization form.

		OSF HEALTHCARE SYSTEM	d/b/a	
		St. FRANCIS HOSPITAL		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov. 310 West Wisconsin Avenue, Suite 700W, Milwaukee, WI 53203-2211 (414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.